IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5325

BEN EARL BROWDER,

Petitioner,

v.

DIRECTOR, DEPARTMENT OF CORRECTIONS OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF PETITIONER BEN EARL BROWDER

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OPINIONS BELOW

None of the opinions in this case has been published. The opinion of the district court granting the petition for a writ of habeas corpus appears in the Appendix at App. 111-17. The order of the district court denying the Director's motion to reconsider is reproduced at App. 161.

The opinion of the court of appeals is noted in the table of "Decisions by Unpublished Opinions" at 534 F.2d 330, and is reproduced at App. 164-68. The order upon denial of rehearing appears at App. 169.

Opinions in related state court proceedings are reported in abstract form only.[1] *People v. Browder*, 13 Ill.App.3d 198, 300 N.E.2d 511 (1973) (affirming conviction on direct appeal) (App. 7–15); *People v. Browder*, 29 Ill.App.3d 596, 331 N.E.2d 162 (1975) (affirming denial of state post-conviction relief) (App. 106–09).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). The judgment of the court of appeals was entered on April 28, 1976; rehearing was denied on June 18, 1976. The petition for writ of certiorari was docketed on September 7, 1976, and certiorari was granted on January 25, 1977.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

United States Constitution, Amendment IV:

The right of the people to be secure in their persons, house, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, except upon probable cause, supported by Oath

[1] Under former Illinois practice, an opinion reported as "abstract only" would be reported in headnote form only. Compare the abstract report in *612 North Michigan Ave. Building Corp. v. Factsystem*, 25 Ill.App.3d 529, 323 N.E.2d 493 with the opinion as subsequently published in full, 34 Ill.App.3d 922, 340 N.E.2d 678 (1973). Abstract opinions fell into disuse in 1975 when the Illinois Supreme Court broadened its rules to allow disposition by unpublished order "when the appellate court determines that an opinion would have no precedential value, that no substantial question is presented, or that jurisdiction is lacking." Illinois Supreme Court Rule 23, 58 Ill.2d R. 23, Ill. Rev. Stat., 1975, ch. 110A, §23.

or affirmation, and particularly describing the place to be searched and the person or things to be seized.

United States Constitution, Amendment XIV:

. . . nor shall any State deprive any person of life, liberty or property, without due process of law . . .

28 U.S.C. §2253, which provides in pertinent part:

In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

Federal Rule of Civil Procedure 6(b):

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d) and (e), 60(b), except to the extent and under the conditions stated in them.

Federal Rule of Civil Procedure 52:

Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the

extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41(b).

(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the questions has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

Federal Rule of Civil Procedure 59:

New Trials; Amendment of Judgments

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period

may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Federal Rule of Appellate Procedure 4(a):

Appeal as of Right—When Taken

(a) Appeals in Civil Cases. In a civil case (including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein) in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of such entry. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this subdivision, whichever period last expires.

The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the district court by any party pursuant to the Federal Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: (1) granting or denying

a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a new trial under Rule 59. A judgment or order is entered within the meaning of this subdivision when it is entered in the civil docket.

Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate.

Circuit Rule 35 (formerly numbered Rule 28) of the United States Court of Appeals for the Seventh Circuit is reproduced in the appendix to this brief, *infra* at 1a.

QUESTIONS PRESENTED

1. Did the court of appeals have jurisdiction to review the district court's order granting petitioner's application for a writ of habeas corpus when notice of appeal was not filed until 128 days after entry of that final order, and when nothing had occurred to toll the time to appeal?

2. Can there be error in a district court's order denying an untimely motion to alter or amend judgment, when the district court lacked jurisdiction to grant that motion?

3. Did the court of appeals exceed the permissible bounds of appellate review when, without identifying any error that had been committed by the district court, it reversed outright on its independent resolution of disputed facts?

4. Can there be "probable cause to arrest" absent grounds to believe that a particular person has committed an offense, and when arrests based on the information available to the

police result in the seizure of several suspects to determine which one, if any, is to be charged with an offense?

5. May law enforcement officials, consistent with the Fourth Amendment and in the absence of exigent circumstances, embark on a warrantless night-time expedition to a dwelling place and arrest all teen-age males found inside the residence in order to determine which one, if any, should be charged with an offense?

6. Does a federal court of appeals have the inherent power to withhold any of its opinions from publication and to a priori deprive such opinions of precedential value?

STATEMENT OF THE CASE

Petitioner Ben Earl Browder is a state prisoner serving a sentence imposed by an Illinois court in 1971. Petitioner applied to the district court for a federal remedy under 28 U.S.C. §2254 after the state courts had refused to adjudicate Browder's claim that his conviction rests on the fruits of a warrantless, dragnet arrest for "investigation of rape."

A. The Search and Seizure

Petitioner was one of four black teen-age males arrested at the Browder residence at about 6:00 p.m. (App. 53) on January 31, 1971 (App. 24), by four experienced[2] Chicago police officers. The arrests were made to "clear up the investigation" (App. 36) of a rape that had been committed two days before.

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[2]The four officers involved in the arrests had an average of almost nine years of experience. Conroy had been a police officer for about five years (App. 52), O'Driscoll for about fifteen years (App. 39), Ahern for about eight years (App. 25), and Toughey for about seven years. (App. 68.)

The investigation of that rape had been handicapped by the inability of the rape victim, Sharon Alexander, to provide other than a vague description of her attackers: She was able to tell the first investigating officer only that she had been attacked by two black teen-age males, one of light complexion, the other of dark complexion, and that both had worn brown jackets. (App. 126, 128.)

Two days after the rape was reported, Officers Conroy and O'Driscoll were assigned to the case. (App. 52, 79.) "Upon receipt of that assignment" (App. 79), these officers obtained the assistance of two other officers (App. 41, 69), and traveled to the Browder residence "on a rape investigation." (App. 69.) These four plainclothes (App. 53) officers, who had neither an arrest nor a search warrant (App. 73), entered the dwelling, and found inside petitioner, his brother Tyrone Browder, their mother, two other teen-age black males, and "a couple of young ladies and some children." (App. 59.) The police explained to Mrs. Browder that they were taking the teen-age black males "down for questioning" (App. 150), and placed those four persons under arrest for "investigation of rape." (App. 24, 30, 81.)

All four arrestees asserted their innocence. (App. 143.) Petitioner had at first refused to accompany the police officers to the stationhouse, but acquiesced when he was "led out of the apartment." (App. 72.)

The four youths arrested at the Browder dwelling were transported to a police station where they were exhibited in a lineup. (App. 29, 70.) Petitioner was the only person in that lineup who was wearing a white hat. (App. 20-21, 73.) In addition, he was the only person with a bandage or cast on his right hand. (App. 20, 25.)

The lineup was viewed by several women who had made rape complaints. (App. 26.) Testimony was in conflict as to whether these women had viewed the lineup simultaneously (App. 19) or at separate times. (App. 23, 26.) There is no evidence in the record as to the basis, if any, for exhibiting

the "suspects" to anyone other than Sharon Alexander.[3]

Petitioner was pointed out at the lineup by Alexander and by one Johnnie Mae Johnson. (App. 23.) According to police testimony (App. 51-52, 76-77), contradicted by petitioner (App. 84), petitioner then told the police officers that he had raped Johnson but that he had not raped Alexander. No attempt was made to obtain a written confession. (App. 82.)

After this evidence had been obtained, petitioner was formally charged with the rapes of Johnson and Alexander. (App. 81.) The three other "suspects" were released after they had been "processed . . . to make sure that they are not wanted for something." (App. 72.)

Conroy and O'Driscoll thereafter completed a police report setting out the facts of the investigation. (App. 146.) This report (App. 159-60, introduced into evidence at App. 148), refers to the arrests of the four male teen-age black males found in the Browder residence as having resulted from "information from a known informer that the boy's that rape a girl (sic) at 3922 W. VanBuren were known by the above names." (App. 159.) Stan Thomas, a police officer who had not been involved in the arrests, but who was summoned after the lineup (App. 57), also prepared a report after charges had been filed against petitioner. (App. 137.) This report (App. 156-58, introduced into evidence at App. 148), recites that Thomas had spoken

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[3] The opinion of the court of appeals (App. 166) adopts a hearsay statement contained in a police report (App. 157) for displaying petitioner to Johnson: "The undersigned also advised by Off. Conroy, that Off. Wm. James #2775 of the 011th dist. had observed the subject Ben E. Browder and noted that he fitted the description of . . . who had a cast on his right wrist and that was wanted for a rape committed on 30 Jan. 1971 . . ." (App. 157.)

The police report had been introduced into evidence by petitioner (App. 148) only because Stan Thomas, the author of that report, admitted (App. 136) that he had referred to it before testifying in the district court. (App. 149.) Thomas did not testify as to what Officer James may have noticed, and no testimony was presented on this question. It was therefore incorrect for the court of appeals to have relied on this hearsay statement.

with Sharon Alexander on January 29, 1971 when she told him that the surname of one of her assailants was "Browder," "and that he lived in the 4000 block of W. Monroe Street." (App. 157) This report also asserts that Thomas had been told by Conroy about a conversation between Conroy and petitioner's mother during which Mrs. Browder stated that "only one of her sons seemed possible of such a thing and identified him as Ben E. Browder." (App. 157.)

B. State Court Proceedings

The possibility that the lineup identification and the oral confession had been obtained through exploitation of an unlawful arrest was not raised at the state court trial. As the district court found (App. 113), there was no conceivable tactical basis for withholding this claim, and the procedural default can only be explained as a "negligent or inadvertent" mistake of appointed defense counsel.

Prior to trial, petitioner's appointed defense counsel[4] moved to suppress petitioner's oral confession, (App. 17-18), and sought to bar the use of identification testimony. (App. 19.) Suppression of the confession was sought on the alleged failure of the interrogating officers to have given petitioner his *Miranda* warnings.[5] Exclusion of the identification testimony was sought

[4] Petitioner was represented by a trial assistant of the Cook County Public Defender. At the time of petitioner's trial, the Cook County Public Defender was organized to provide a "zone defense," i.e., an indigent defendant would have one attorney at the preliminary hearing courtroom, another attorney at arraignment, and a third at trial. A "trial assistant" would be assigned to a judge hearing felony cases. Virtually all "public defender" cases in that courtroom would be defended by that "trial assistant."

[5] The form motion to suppress contained a conclusory allegation that the confession was the product of "mental coercion." (App. 17, ¶5.) This assertion was subsequently abandoned. (App. 27.)

on the grounds of suggestiveness in the lineup procedures. (App. 48-49.)

At the hearing on the motion to suppress identification testimony, officer Conroy testified that the arrests had been made on information about "a possible offender by the name of Browder," corroborated by a "listing" in police files for Tyrone Browder (App. 21), petitioner's brother. Conroy admitted on cross-examination that four persons had been arrested at the Browder residence for "investigation of rape." (App. 24.)

Testimony at the hearing on the motion to suppress the confession established that the alleged oral statement had been triggered by the lineup identification. (App. 28.) Additional evidence pertaining to the circumstances of the arrest was adduced at the hearing on this motion, and it became clear that the four arrests had been made so that the police "could clear up the investigation." (App. 36.)

These pre-trial motions were denied. (App. 49-50.) The case then proceeded to trial, where the defense theory of the case was that the identification testimony was unreliable (App. 51), and that the police testimony about the existence of an oral confession should not be believed. (Ibid.)

In cross-examination of the prosecution witnesses, defense counsel repeatedly returned to the circumstances of the arrest, and established that the expedition to the Browder dwelling had been made without an arrest warrant (App. 73), without a search warrant (Ibid.). and that, prior to traveling to the Browder residence, the police claimed to have known that "the gentlemen would be waiting." (App. 63.)

Browder testified on his own behalf, asserted his innocence (App. 84), and denied having made an oral confession. (Ibid.) In cross-examination, petitioner stated that at the time of the rape he was at home in the company of his mother and several other persons. (App. 88.) The defense rested without calling any other witnesses. (App. 98.)

In his closing argument, the prosecutor commented upon the failure of the defense to have presented additional evidence.

(App. 99–100.) Defense counsel waived final argument (App. 101), and petitioner was convicted of rape. (Ibid.) The unlawful arrest issue was not raised in post-trial motions (App. 103–03), which were denied. (App. 104.)

Petitioner sought to raise the unlawful arrest issue for the first time in his direct appeal to the Illinois Appellate Court. (App. 9.)[6] That court held that because "this contention was not raised in the trial court, either during the trial or in the motion or argument for a new trial (Ibid.), "it cannot now be raised on appeal." (App. 11.) Petitioner then applied for discretionary review in the Illinois Supreme Court (App. 16), arguing that when "defense counsel inadvertently failed to pinpoint the unlawful arrest as the basis of the motions to suppress the fruits of the arrest," the waiver rule applied by the appellate court improperly "denied defendant a fair opportunity to raise and have adjudicated on direct appeal his Fourth Amendment claims, when the factual basis for these claims is clear from the trial court record." (Ibid.) Review was denied without opinion. 54 Ill.2d 597 (1973).

Petitioner also sought to raise the unlawful arrest issue under the Illinois Post-Conviction Hearing Act, Ill.Rev.Stat. ch. 38, §122-1 et seq. His application for relief was dismissed without the reception of evidence by the trial court. (App. 4, ¶8.) On appeal, the Illinois Appellate Court upheld the decision of the trial court to refuse to adjudicate the Fourth Amendment issue, holding that this issue was "res judicata" because it had been raised, albeit not adjudicated, on direct appeal. (App. 108.)

[6]While petitioner was again represented by the Cook County Public Defender on this appeal, trial counsel was not involved in appellate proceedings.

C. Federal Habeas Corpus Proceedings

On October 21, 1975, following the termination of state court proceedings,[7] the district court granted petitioner's application for a writ of habeas corpus on the basis of the state trial record. (App. 110.) The district court held that the failure of petitioner's trial counsel to have raised the unlawful arrest issue was an "inadvertent or negligent mistake" which, under *Henry v. Mississippi*, 379 U.S. 443 (1965) did not bar petitioner from federal habeas corpus relief on his Fourth Amendment claim. (App. 113.) On the merits of that issue, the district court found that petitioner had been arrested without probable cause. (App. 114.) The illegality of the arrest was held to have tainted the alleged oral confession (App. 116) and the lineup identification (App. 115), but not the in-court identification. (App. 116.) Execution of the writ was suspended for 60 days to allow a re-trial. (App. 117.)

Twenty–six days after the petition had been granted, the Director withdrew the state court record from the files of the district court. (App. 1.) Two days thereafter, and twenty-eight days after the petition had been granted, the Director filed a "motion to further stay the execution of the writ of habeas corpus and to conduct an evidentiary hearing." (App. 118.) This motion was predicated on the fact that the "issue of probable cause was never litigated" in state court proceedings (App. 119, ¶5), and asserted that "from a preliminary inquiry

[7]Petitioner's appeal from the denial of state collateral relief was before the Illinois Appellate Court at the time the habeas petition was filed. (App. 5, ¶9.) The district court held that recourse to the state collateral remedy had not been necessary to exhaust state remedies (App. 105), but stayed proceedings before it "until such time as the Illinois court rules or dismisses the case on petitioner's motion for voluntary dismissal." (Ibid.) Shortly thereafter, the state appellate court affirmed the denial of state collateral relief (App. 106), and the district court took active jurisdiction of the case. (App. 1.)

into matters outside the record it appears that one could reasonably believe that probable cause did exist." (App. 119, ¶4.)

After concluding "that the request for an evidentiary hearing should not be denied solely because it is untimely," (App. 120), and over petitioner's objection that the "court no longer has jurisdiction to alter or amend its final order of October 21, 1975" (App. 112), the district court set the motion for a hearing. (App. 121.)

At the hearing, the Director sought to prove that there had in fact been probable cause to arrest through the testimony of three police officers. The first, James Newsome, testified to the initial police contact with Sharon Alexander (App. 125), and admitted that Alexander had been able to provide only a vague and non-specific description of her assailants. (App. 128.) The second witness, Stan Thomas, stated that he had interviewed Alexander on the day of the rape (App. 129), and that she had told him that she knew the surname of one of her assailants to be "Browder," and that she knew that he lived in the "4000 block of Monroe." (App. 130.) Two days later, on January 31, 1971, Thomas enlisted the aid of Martin Conroy in the investigation. (App. 132.) Thomas admitted that he was unfamiliar with the inhabitants of the neighborhood which contained the "4000 block of Monroe," (App. 135.) No explanation was offered for Thomas' failure to have acted more promptly on the information that he had allegedly received from Alexander.

Conroy testified that he had become involved in the investigation on January 31, 1971. (App. 138.) His first act, he claimed, was to travel to another police station to check the "Youth Files." (App. 139.) From these files, Conroy "came up with the name Browder and address of 4053 West Monroe, and the first name Tyrone, a 16 year old male Negro." (Ibid.) After obtaining this information, and accompanied by his partner, Francis O'Driscoll (App. 140), Conroy spoke with Alexander. (Ibid.) According to Conroy, she told him that one of her assailants was a "teen-ager older than her, like 16, 17, 18 like that, and it was a Browder that lived on

Monroe." (App. 146.) Conroy claimed to have then verified that a Browder family lived at 4053 West Monroe Street. (App. 141.) After obtaining assistance from two other officers (Ibid.), and still accompanied by his partner, Conroy went to 4053 West Monroe Street to arrest "a teen-aged Browder, like 15, 16, 17, 18." (App. 146.)

Inside the dwelling at that address, Conroy found two teenagers whose surname was Browder. (App. 147.) They both denied involvement in the offense under investigation (Ibid.), and they were both arrested "[t]o see which one, if either, would be the one who would be identified." (App. 148.) Conroy admitted that he did not know which one, if either, would be identified. (Ibid.) Conroy claimed that the two other youths found in the Browder residence had voluntarily accompanied the police officers to stand in the lineup to insure that it would be fair. (App. 142-43.)

A police report (App. 159-60), which Conroy had helped prepare (App. 146), and which he had adopted as his own (App. 148), was introduced into evidence by petitioner. (Ibid.) This report states that four persons had been arrested at the Browder residence, and that the arrests were made on "information received from a known informer." (App. 159.)

Conroy also repeated his trial testimony (App. 23), that prior to making the arrests he had spoken with petitioner's mother, who—he claimed—had stated that "if it was an assault on a girl, it wouldn't be Tyrone, it would be Ben Earl, her other son." (App. 142.) Mrs. Browder, who had not testified at trial, testified in the district court, and denied having made such a statement. (App. 151.)

After hearing all of the evidence, the district court denied the motion to reconsider, finding that "the writ of habeas corpus was properly issued on October 21, 1975." (App. 161.) Execution of the writ was stayed for five days "pending prompt filing of notice of appeal and application to the Court of Appeals for a further stay." (Ibid.)

On January 27, 1976, the Director filed its notice of appeal, seeking review of "the orders issuing a writ of habeas corpus

entered in this action on October 21, 1975 and January 26, 1976." (App. 162.) A panel of the court of appeals refused to stay execution of the writ (App. 163), and petitioner was released from custody.

Another panel of the court of appeals subsequently reversed the order granting the petition for writ of habeas corpus. (App. 168.) The court's opinion—which was designated as an "unpublished order"—recognizes that appellate jurisdiction was based on a motion to reconsider filed 28 days after entry of the district court's order granting the petition. (App. 165.) The opinion does not identify the error justifying reversal, but concludes that there had in fact been probable cause to arrest. (App. 168):

> Even though there were slight differences in the testimony of Officer Conroy at the evidentiary hearing from the arrest report and the trial, the police had probable cause to believe that the assailant was either Ben Earl Browder or his brother Tyrone Browder between whom a resemblance was noted.

Re-hearing and a suggestion that the case be re-heard in banc was denied without opinion. (App. 169.) Petitioner subsequently requested that the panel's "unpublished order" be reissued as a published opinion. (App. 170–71.) This motion was denied without explanation. (App. 172.)

SUMMARY OF ARGUMENT

The threshold question in this case is whether the court of appeals had jurisdiction to review the district court's order granting petitioner's application for a writ of habeas corpus. The order granting the petition was entered on October 21, 1975; twenty-eight days thereafter, or November 18, 1975, the Director filed a motion to reconsider. The district court held a hearing on the motion to reconsider, and the Director's notice of appeal was filed after the district court had refused to alter or amend its order granting the petition.

The motion to reconsider was not filed within the mandatory and jurisdictional time limits of Rules 52 and 59 of the Federal Rules of Civil Procedure, and it did not toll the time to appeal from the final order. Notice of appeal, filed on January 27, 1976, was therefore hopelessly beyond the 30 day limit of Rule 4 of the Federal Rules of Appellate Procedure, and the court of appeals lacked jurisdiction to review the final order of the district court.

Another consequence of the untimeliness of the motion to reconsider was that the district court had lost jurisdiction to alter or amend its order granting the petition, and therefore lacked the power to grant the motion to reconsider. Thus, an appeal from the order denying reconsideration could not vest the court of appeals with the power to reverse the decision of the district court refusing to grant the untimely motion to reconsider.

Even if the court of appeals did have jurisdiction to review the decision of the district court, the court below erred when it considered the case *de novo* and reversed outright, applying its independent appraisal of disputed facts to a legal standard for warrantless arrests which, if allowed to stand, is tantamount to a repeal of the Fourth Amendment. Because this Fourth Amendment standard is plainly wrong, there is no need to remand to the district court for resolution of the factual disputes, even if there had been a timely notice of appeal.

While the absence of a timely notice of appeal would allow the Court to reverse the decision below without reaching the Fourth Amendment questions, the same result would be achieved by disposition on the merits. *Stone v. Powell*, 428 U.S. 465 (1976) is no bar to habeas corpus relief. First, the totality of state procedures failed to provide petitioner with an opportunity for full and fair litigation of his Fourth Amendment claim, the *sine qua non* of *Stone v. Powell.* Second, even if the state had provided petitioner with a "full and fair opportunity," but had nonetheless misconceived the Fourth Amendment and denied relief, a federal remedy would be required because of the flagrancy of Fourth Amendment

violation–not present in *Stone v. Powell*–which underlies this case.

The Fourth Amendment standard applied by the court of appeals allows the police to enter dwellings, at night, without a warrant, and absent exigent circumstances, in order to seize several suspects to determine which one, if any, should be charged with an offense. Allowing arrests when there is insufficient information to warrant a belief that a particular person has committed a crime strikes at the central teaching of this Court's Fourth Amendment jurisprudence. Legitimizing multiple suspect, warrantless arrests "for investigation" would reduce the Fourth Amendment to little more than rhetoric.

This case also presents the question repeatedly reserved by the Court, i.e., whether a warrant is required to search a dwelling when the seizure of a person, rather than "papers and effects" is sought. A search warrant plainly would have been required if the police in this case had entered the dwelling to seize physical evidence, and it should be of no consequence that a dwelling search is made to seize persons, rather than to seize "papers and effects." Requiring recourse to the disinterested judicial officer contemplated by the Fourth Amendment would provide the greatest protection against recurrence of the egregious police misconduct apparent in this case.

In summary, whether this case is resolved on the jurisdictional question or on the merits of the Fourth Amendment issues, the result is the same: The decision below must be reversed, and the case remanded to the district court with instructions to reinstate its writ of habeas corpus.

An additional issue presented by this case arises from the fact that the decision below was reached in a purportedly non-precedential "unpublished order." This is the first case where the propriety of a circuit rule authorizing such dispositions is squarely at issue. These rules–which have been adopted with minor variations in each of the circuits–are based on the assumption that a court of appeals has the power to determine which of its adjudications are to have precedential value, and vest in the court of appeals the power to decide which of its

opinions are to be published. These rules have severe shortcomings, are founded on tenuous legal grounds, and exceed the powers vested in a court of appeals by 28 U.S.C. §2071. Until and unless a uniform "no-publication" rule is promulgated by this Court and approved by Congress pursuant to 28 U.S.C. §2072, the courts of appeals lack the power to designate any of their opinions as "not for publication" and as "non-precedential." Accordingly, the court below should be directed to release its decision in this case–and, by implication, its decisions in all other cases decided by "unpublished orders"–for publication free of any restrictions on citations in subsequent cases.

I.

THE COURT OF APPEALS LACKED JURISDICTION TO REVERSE THE FINAL ORDER OF THE DISTRICT COURT.

The respondent in this case, appellant in the court below, failed to file a timely notice of appeal. The court of appeals therefore lacked jurisdiction and its decision is a nullity which must be reversed.

The thirty day period in which an appeal could have been perfected in this case started to run on October 21, 1975, when the district court's final order[8] of that date (App. 110)

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[8] An appeal in a habeas corpus proceeding lies from the "final order." 28 U.S.C. §2253. The order of October 21, 1975 was "final" because it "terminate[d] the litigation between the parties on the merits of the case, leav[ing] nothing left to be done but to enforce by execution what had been determined." *St. Louis, Iron Mountain and Southern Ry. Co. v. Southern Express Co.*, 108 U.S. 24, 28-29 (1883). Had an appeal been taken from this order, and the decision of the district court affirmed, that court "would have nothing to do but to execute the decree which it had already rendered." *Independent School District v. Hall*, 106 U.S. 428, 430-31 (1882).

was entered on the civil docket.[9] (App. 1.) Notice of appeal, however, was not filed until January 27, 1976 (App. 3), 128 days after entry of the final order, and hopelessly beyond the jurisdictional time limits of Rule 4(a) of the Federal Rules of Appellate Procedure.[10]

In lieu of an appeal, the Director asked the district court to receive additional evidence and to alter its final order. (App. 118–19).) This motion, however, was not made until 28 days after entry of the final order, and did not toll the time to appeal.

Rule 4(a) of the Rules of Appellate Procedure makes clear that the time to appeal will be only tolled by a timely motion under Civil Rules 50(b), 52(b), or 59. The motion to reconsider in this case sought the type of relief contemplated by Rule 52(b) (new findings of fact) and Rule 59(a) (entry of amended judgment). To be timely under either of these rules, a motion to reconsider must be made within ten days of entry of the final order.[11] Civil Rule 6(b) prohibits a district court

[9] Rule 4(a) of the Federal Rules of Appellate Procedure provides, in pertinent part, that notice of appeal shall be filed "with the clerk of the district court within 30 days of the entry of the judgment or order appealed from," and that "a judgment or order is entered within the meaning of this subdivision when it is entered on the civil docket."

[10] There can be no question that a timely notice of appeal is a jurisdictional prerequisite to appellate review. See, e.g., *Brooks v. Norris*, 52 U.S. (11 How.) 204 (1850); *Cummings v. Jones*, 104 U.S. 419 (1882); *Scarborough v. Parquod*, 108 U.S. 567 (1883); *Credit Co. v. Arkansas Central Ry. Co.*, 128 U.S. 567 (1888); *Conboy v. First National Bank*, 213 U.S. 141 (1906); *Old Nick Williams Co. v. United States*, 215 U.S. 541 (1910); *United States v. Schaefer Brewing Co.*, 356 U.S. 227 (1958); *United States v. Robinson*, 361 U.S. 220 (1960); *Fallen v. United States*, 378 U.S. 139 (1964).

[11] Rule 52(b) requires that a motion to amend findings of fact or to make additional findings must be "made not later than 10 days after entry of judgment." Rule 59 requires that a motion for a new trial, or a petition for re-hearing must be "served not later than 10 days after the entry of the judgment." At least one court has held the distinction between "made" and "served" to be a distinction with a difference. *Hahn v. Becker*, 551 F.2d 741 (7th Cir. 1977). This question is not presented here, because the motion was filed and served on the same day.

from enlarging this "mandatory and jurisdictional" time period. *United States v. Robinson*, 361 U.S. 220, 229 (1960).

Thus, because the motion to reconsider was untimely under Rules 52 and 59, it did not toll the time to appeal. Notice of appeal not having been filed until 128 days after entry of the district court's final order, the court of appeals lacked jurisdiction to review that order.

The notice of appeal also sought review of the order of January 26, 1976 denying the untimely motion to reconsider. (App. 162.) Review of that order could not vest the court of appeals with jurisdiction in any meaningful sense because the district court had lacked the power to grant the motion to reconsider: For almost thirty years, the power of a district court to receive additional evidence and to alter or amend a final order has been circumscribed by the time limits of Civil Rules 52 and 59.[12] The motion to reconsider was untimely under these rules and was a nullity.

The untimeliness of the motion to reconsider is apparent on the face of the opinion of the court below. (App. 165.) From a cryptic footnote in that opinion, it appears that the court of appeals was holding that while the motion to reconsider may not have tolled the time to appeal from the final order, it was nonetheless effective to render non-final that portion of the district court's decision that petitioner's arrest was without probable cause (App. 166 n. 2):

[12] Prior to the 1946 amendments to the Rules of Civil Procedure, a district court could entertain a petition for rehearing at any time during the term of court in which a judgment had been entered. See *United States v. Mayer*, 235 U.S. 55, 67 (1914). Practice in habeas corpus proceedings conformed to this procedure. See, e.g., *Tiberg v. Warren*, 192 F. 458 (9th Cir. 1911); *Aderhold v. Murphy*, 103 F.2d 492 (10th Cir. 1939).

The 1946 amendments to the Rules of Civil Procedure abolished terms of court, and limited the power of a district court to alter or amend a final order to the time periods of Rule 59. See Advisory Committee Comments to the 1946 Amendments to Rule 73 of the Rules of Civil Procedure, 5 F.R.D. 484, 486.

> Respondent contends that even if there was no probable cause for the arrest, the confession would be admissible under *Brown v. Illinois*, 422 U.S. 590 (1975). In light of our decision in the instant case, the court need not consider that issue *nor need it consider whether there was an untimely appeal as to this issue.* (emphasis supplied)

The habeas corpus statute does not authorize piecemeal appeals, *Collins v. Miller*, 252 U.S. 364, 370 (1920), and if there was an untimely appeal as to one issue, there was an untimely appeal as to all issues that had been decided by the district court.

The only way in which the district court could have granted the post-judgment relief sought by the Director was through Rule 60(b) of the Rules of Civil Procedure. The Director has expressly disavowed reliance upon this rule, recognizing we presume, that there was no basis for Rule 60(b) relief.[13] Following this concession, it was the duty of the court of appeals to dismiss the appeal: "Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the case." *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868).

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[13] In its reply brief (at 3) in the court of appeals, the Director stated that "respondent's motion was not filed under Rule 60." The same assertion is made in this Court, Opposition to Pet. for Writ of Cert. at 7.

The Director should not be permitted to withdraw these concessions. *United States v. Ortiz*, 422 U.S. 891, 898 (1975). To do so, however, would be futile. First, a Rule 60(b) motion may not be used as a subterfuge for an untimely Rule 59 motion. *Hartman v. Lauchli*, 304 F.2d 431, 432 (8th Cir. 1962); *Swam v. United States*, 327 F.2d 431, 433 (7th Cir. 1964). Second, viewed as an appeal from the denial of Rule 60(b) relief, the Director's appeal is utterly without merit: There is no basis upon which it could even be argued that the district judge had abused his discretion in "ruling that sufficient grounds for disturbing the finality of the judgment were not shown in a timely fashion." *Brennan v. Midwestern United Life Insurance Co.*, 450 F.2d 999, 1003 (7th Cir. 1971).

The Director had three alternatives when the district court granted the petition: To appeal, to file a timely motion to reconsider, or to accept the district court's decision and allow Illinois to re-try petitioner. The Director chose a fourth course of action and filed its untimely motion to reconsider. The effect of this choice may, in hindsight, be regretted, but the consequences of this choice are inescapable: "When the time for taking an appeal has expired it cannot be arrested or called back by a simple order of court." *Credit Co. v. Arkansas Central Ry. Co.*, 128 U.S. 258, 261 (1888). As the Court stated in *Ackerman v. United States*, 340 U.S. 193 (1950);

> [The Director] made a considered choice not to appeal . . . His choice was a risk, but calculated and deliberate and such as follows a free choice. [The Director] cannot be relieved of such a choice because hindsight seems to indicate to him that his decision not to appeal was probably wrong . . . Id. at 198.

To find that the court of appeals had jurisdiction to review the decision of the district court in this case would be to "twist the fabric" of Rule 4 of the Rules of Appellate Procedure "more than it will bear." See *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 746 (1976). Accordingly, the decision below must be reversed, and the case remanded to the district court with instructions to reinstate its writ of habeas corpus.

II.

A COURT OF APPEALS MAY NOT DECIDE FACTUAL ISSUES DE NOVO.

Even assuming that the court of appeals had jurisdiction to review the decision of the district court, it lacked the power to reverse outright on its independent appraisal of disputed facts.

That the court of appeals considered the case *de novo* without deference to the opportunity of the district judge to have observed the character and demeanor of the witnesses is

apparent on the face of the "unpublished order" (App. 168):

> Even though there were *slight differences* in the testimony of Officer Conroy at the evidentiary hearing from the arrest report and the trial, the police had probable cause to believe that the assialant was either Ben Earl Browder or his brother Tyrone Browder, between whom a resemblance was noted. (emphasis supplied)

Perjury cannot be characterized as a "slight difference in testimony." Conroy plainly lied in the district court when he stated that only petitioner and his brother had been arrested at the Browder dwelling, and that the two other youths found inside the home had voluntarily accompanied the police to the stationhouse. (App. 143.) Conroy's trial testimony was directly to the contrary: "At the Browder home there was Ben Earl, his brother Tyrone, the two boys, I don't really recall their names *but we arrested them* and they stood in the lineup." (App. 29.) (emphasis supplied)[14]

In addition, Conroy's testimony in the district court bristled with new details, inconsistent with trial testimony, which were directed towards justifying the reasonableness of the arrests.[15]

[14] Two of the other officers involved in the arrest testified in state court that four persons had been arrested. (App. 73, 81.) The third officer stated that petitioner had been arrested (App. 64), that "[t]here were four fellows that were taken into the station" from the Browder residence (Ibid), and that all four had voluntarily accompanied the police. (App. 67.) Conroy's arrest report refers to the arrest of four persons (App. 159, introduced into evidence at App. 148), but later states that only petitioner had been arrested. (App. 160.)

[15] At trial, Francis O'Driscoll, Conroy's partner, testified that the expedition to the Browder home commenced "upon receipt of that assignment." (App. 79) Conroy testified in state court that the arrests were based on "information about a possible offender by the name of Browder." (App. 31.) The apparent source of this "information," according to Conroy's police report (App. 159, introduced into evidence at App. 148), was "information from known informer."

In contrast to trial testimony, Conroy testified in the district court that the arrests had been based on information received from Sharon Alexander, and that prior to making the arrests he had spoken with her, and then spoken to one "Little Man," who had pointed out the location of the Browder residence. (App. 140-41.) Accompanying Conroy in these activities was his partner, Francis O'Driscoll. (App. 140.)

In this case, the district judge would have been justified in rejecting the entirety of Conroy's testimony. But no matter how slight the differences in testimony may have been, the function of appellate courts "is not to decide factual issues de novo." *Zenith Radio Corp. v. Hazeltine Research Corp.*, 395 U.S. 100, 123 (1969). Appellate review of factual issues is limited by the clearly erroneous test, *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948), especially when, as here, questions of "design, motive and intent with which men act" are at issue. *United States v. Yellow Cab Co.*, 338 U.S. 338, 341 (1949).

The ultimate finding of fact made by the court of appeals—that "the police had probable cause to believe that the assailant was either Ben Earl Browder or his brother Tyrone" (App. 168)—indicates that in addition to resolving factual questions de novo, the court of appeals was holding that the Fourth Amendment permits the warrantless arrest of several persons at night, from a dwelling, whenever the police believe that the offender sought will turn up among those arrested.

As set out below, such a standard, if allowed to stand, is tantamount to a repeal of the Fourth Amendment. But even assuming the correctness of this novel standard, the appropriate disposition of the appeal would have been to remand to the district court for its resolution of disputed facts and a determination if, in fact, the "police had probable cause to believe that the assailant was either Ben Earl Browder or his brother Tyrone." As this Court reminded the federal courts of appeals in *DeMarco v. United States*, 415 U.S. 449, 450 n.* (1974), "factfinding is the basic responsibility of district court, rather than appellate courts, and . . . the Court of Appeals should not have resolved in the first instance this factual dispute which had not been considered by the District Court.

As we demonstrate below, the Fourth Amendment standard applied by the court of appeals is plainly wrong, and even if there was a timely notice of appeal, there is no need to remand

to the district court for resolution of the factual disputes. Instead, the decision below must be reversed, and the case remanded to the district court with instructions to reinstate its writ of habeas corpus.

III.

THE BLATANTLY INVESTIGATIVE, WARRANTLESS NIGHT-TIME ARRESTS MADE AT PETITIONER'S DWELLING IN THE ABSENCE OF EXIGENT CIRCUMSTANCES WERE CONTRARY TO THE FOURTH AMENDMENT.

Introduction

The decision of the court of appeals vests police officers with the powers of a general warrant—the discretion to search when and where they choose, and the power to arrest whomever they may suspect. These are precisely the evils which were proscribed by the Fourth Amendment, and the court of appeals erred in concluding that petitioner had been lawfully arrested.

In our view, the court of appeals lacked jurisdiction to consider the legality of petitioner's arrest because the Director had failed to file a timely notice of appeal from the district court's final order. See *ante* at 19-23. The Court may therefore reverse the decision below without reaching the Fourth Amendment questions. On prior occasions, however, the Court has declined to resolve a threshold jurisdictional question when the same result would be achieved by disposition on the merits. *United States v. Augenblich*, 393 U.S. 348, 349-52 (1969); *Norton v. Matthews*, 427 U.S. 425, 530-32 (1976). Petitioner, of course, has no preference for the ground which is used to reverse the decision of the court of appeals, and we submit the following argument in the event the Court

chooses to reverse on the Fourth Amendment issues in this case.[16]

A.

PETITIONER WAS ARRESTED ABSENT THE "QUANTUM OF INDIVIDUALIZED SUSPICION" REQUIRED BY THE FOURTH AMENDMENT.

The "quantum of individualized suspicion" required by the Fourth Amendment, *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976), was intended to eliminate indiscriminate and discretionary searches and seizures made under general warrants.[17] The arrests in this case are precisely the type of seizures which would have been authorized by a general warrant.

First, the arrests were of indiscriminate quality. While the police may have intended to arrest "a teen aged Browder, like 15, 16, 17, 18," (App. 146), two teen-age black males, whose surname was not Browder, were caught up in the dragnet. Second, the arrests were the product of unfettered police discretion, both as to the time and place of the arrests, and as to the decision to arrest all of the teen-age males found within the Browder residence. These indicia of seizures made as under a

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[16] As discussed infra at 41-50, habeas corpus relief would not be precluded by *Stone v. Powell*, 428 U.S. 465 (1976).

[17] See, e.g., *G.M. Leasing Corp. v. United States*, --U.S.--, 97 S.Ct. 619 (1976); *Stone v. Powell*, 428 U.S. 465, 482 (1976); *United States v. Ortiz*, 422 U.S. 891, 895-96 (1975); *United States v. United States District Court*, 407 U.S. 297, 316-17 (1972); *Berger v. New York*, 388 U.S. 41, 58 (1967); *Stanford v. Texas*, 379 U.S. 476, 480-86 (1965); *Marcus v. Search Warrant*, 367 U.S. 717, 724-29 (1961); *Henry v. United States*, 361 U.S. 98, 100-01 (1959); *Frank v. Maryland*, 359 U.S. 360, 363-65 (1959); *Marron v. United States*, 275 U.S. 192, 195 (1927); *Boyd v. United States*, 116 U.S. 616, 624 (1886).

general warrant reflect the absence of the "quantum of individualized suspicion" required by the Fourth Amendment.

In the view of the court of appeals, petitioner and his brother Tyrone Browder were arrested because they both resembled a suspect allegedly sought by the police: A dark complected, teen-age male, of unknown height and weight, with no other known physical features, whose surname was Browder and who lived in the "4000 block" of West Monroe Street in Chicago, Illinois. (App. 165.)[18] Only a warrant to seize "all teen-aged Browders who live in the 4000 block of West Monroe Street" could have been issued on this information. Such a warrant is but a short step removed from a "ridiculous warrant against the whole English nation."[19] and is virtually identical to a warrant to arrest all "Blackie Toy's, operator of a laundry somewhere on Leavenworth Street," condemned as "no better than the wholesale or 'dragnet' search warrant" in *Wong Sun v. United States*, 371 U.S. 471, 481 n. 9 (1963).

In this case, it is obvious that if the police had applied for a warrant they would not have been able to describe with specificity the person to be seized. As the principal arresting officer admitted, he did not know which, if any, of the suspects he had placed under arrest would be identified at the planned lineup. (App. 148.)

In prior cases, the Court has repeatedly held that the Fourth Amendment means what it says in its requirement that probable cause be sufficient to particularly describe the person to be

[18] The court of appeals mistakenly concluded that petitioner and his brother Tyrone Browder were of similar appearance at the time of arrest. (App. 168.) Trial testimony reveals that petitioner was the only person seized at the Browder dwelling who had his arm in a "bandage or cast," (App. 20, 25), a salient characteristic lacking in the physical description available to the police at the time of arrest.

[19] *Stanford v. Texas*, 379 U.S. 476, 483 (1965), quoting II May's *Constitutional History of England*, 247 (Am Ed 1864).

seized. "[A]n officer may lawfully arrest a person when he is apprised of facts sufficient to warrant a belief that *the person* has committed or is committing a crime." *Terry v. Ohio*, 392 U.S. 1, 26 (1968) (emphasis supplied)[20] Applying the unambiguous language of the Fourth Amendment, virtually every court which has considered the question has condemned as unlawful an arrest made solely because the arrestee was one of several persons who corresponded to a non-specific description of an offender sought by the police.[21] The Seventh Circuit, both in this case and in a subsequent decision, has held to the contrary.[22]

[20] See also *Carroll v. United States*, 267 U.S. 132, 161 (1925) ("reasonable ground to believe that the accused has been guilty of a felony"); *Jones v. United States*, 357 U.S. 493, 502 (1958) (Clark, J., dissenting) ("Probable cause is reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offense with which he is charged."); *Beck v. Ohio*, 379 U.S. 89, 91 (1964) (whether, at the time of arrest, the facts known "were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense."); *United States v. Marion*, 404 U.S. 307, 320 (1971) ("To legally arrest and detain, the Government must assert probable cause to believe that the arrestee has committed a crime."); *United States v. Watson*, 423 U.S. 411, 431 n. 4 (Powell, J., concurring) (". . . and, of course, that the person to be arrested was the offender."); *Stone v. Powell*, 428 U.S. 465, 538 (White, J., dissenting) (". . . reasonable ground to believe that a crime has been committed and that a particular suspect has committed it").

[21] See, e.g., *Gatlin v. United States*, 117 U.S.App.D.C. 123, 127, 326 F.2d 666, 670 (1963); *United States v. Shavers*, 524 F.2d 118 (5th Cir. 1975); *In re Puma County Anonymous*, 110 Ariz. 98, 103, 515 P.2d 600, 604-05 (1973); *In re Woods*, 20 Ill.App.3d 641, 647-48, 314 N.E.2d 606, 610 (1974); *Commonwealth v. Jackson*, 459 Pa. 669, 674-75, 331 A.2d 189, 191 (1975).

[22] *United States ex rel. Burbank v. Warden*, 535 F.2d 361, 366 (7th Cir. 1976), reversing 404 F.Supp. 656 (N.D.Ill. 1975) (finding probable cause to arrest because suspect corresponded to description of offender as a young black male of average size who was considered to be attractive in appearance).

Allowing arrests, as in this case, where there is insufficient information to warrant a belief that a particular person has committed a crime is to resurrect the unbridled authority of the general warrant by "plac[ing] the liberty of every man in the hands of every petty officer."[23] Such a standard for seizures of the person strikes at the "central teaching of this Court's Fourth Amendment jurisprudence," *Terry v. Ohio*, 392 U.S. 1, 21 n. 18 (1968). If this "demand for specificity," *Ibid.*, is relaxed, then "the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police." *Beck v. Ohio*, 379 U.S. 89, 97 (1964). *See also Johnson v. United States*, 333 U.S. 10, 14 (1948). For these reasons, the decision below cannot be allowed to stand.

B.

WARRANTLESS ARRESTS FOR INVESTIGATION ARE CONTRARY TO THE FOURTH AMENDMENT.

That the arrests in this case were made "for investigation of rape" is apparent from the state trial transcript (App. 24, 30, 36, 53, 81–82), and was admitted in the district court by the principal arresting officer (App. 147-48):

> Q: All right: Isn't it true, sir, that the purpose behind your arrest of the teen-aged Browders was to bring them down to the station house to place them in a line-up?
>
> Officer Conroy: To see if they could be identified by the victim. To see which one would be identified.

[23] *Boyd v. United States*, 116 U.S. 616, 625 (1886), quoting the arguments of James Otis against reissuance of writs of assistance in Boston following the death of George II in 1761. See Wroth & Zobel (eds.), *Legal Papers of John Adams* 141-42 (1965).

> Q: At the time you arrested both Browders you didn't know which one, if either, would be the one who would be identified?
>
> A: That is correct, sir.

These warrantless (App. 73) investigatory arrests are contrary to *Davis v. Mississippi*, 394 U.S. 721 (1969), where the Court held that the Fourth Amendment prohibits the warrantless seizure of several persons merely to gather evidence to decide which one, if any, should be charged. In this case, the court of appeals sought to distinguish *Davis*—where the absence of probable cause had been conceded, 394 U.S. at 726—by finding that the investigative arrests here were based on probable cause. (App. 168.) But a conclusion that there could have been probable cause to arrest in this case would expand that "practical compromise," *Gerstein v. Pugh*, 420 U.S. 103, 113 (1975), into a roving commission for investigative arrests, presaging "wholesale intrusions upon the personal security of our citizenry." *Davis v. Mississippi*, 394 U.S. at 726.[24]

Concluding that a warrantless arrest is permissible when, as here, several suspects are arrested "to clear up an investigation" (App. 36), allows the police to arrest "at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on 'probable cause.' " *Mallory v. United States*, 354 U.S. 449, 456 (1957).[25] Such a function for warrantless arrests is contrary to what the Court said in *Gerstein v. Pugh*, 420

[24] Because it is apparent from the state trial record that petitioner was seized in a multiple suspect warrantless investigatory arrest, the district court was justified in granting the petition without an evidentiary hearing. See *Brewer v. Williams*, —U.S.—, —, —, 97 S.Ct. 1232, 1235 (1977).

[25] The court of appeals read *Mallory v. United States, supra*, as not prohibiting multiple suspect arrests for investigation. (App. 167.) This analysis disregards the purpose of the exclusionary rule applied in *McNabb v. United States*, 318 U.S. 332 (1943), and re-applied in *Mallory*, i.e., to deter arrests for questioning.

U.S. 103 (1975): "[A] policeman's on the scene assessment of probable cause provides legal justification for arresting a person suspected of a crime, and for a brief period of detention *to take administrative steps incident to arrest.*" Id. at 113–14. (emphasis supplied) The blatantly investigative arrest sanctioned by the court of appeals in this case "collides violently with the basic human right of liberty," and "can be tolerated only in a society which is willing to concede to its government powers which history and experience teach are the inevitable accoutrements of tyranny."[26]

An arrest is a significant intrusion upon personal liberty. "It is intended to vindicate society's interest in having its laws obeyed, and it is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows." *Terry v. Ohio*, 392 U.S. 1, 26 (1968). "Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family, and his friends." *United States v. Marion*, 404 U.S. 307, 320 (1971). Little reminder is needed that an arrest "is abrupt, is effected with force or threat of it, and [occurs] often in demeaning circumstances." *United States v. Dionisio*, 410 U.S. 1, 10 (1973), quoting from *United States v. Doe (Schwartz)*, 457 F.2d 895, 898 (2d Cir. 1972). In addition, an arrest record may adversely affect present or future employment. See *Menard v. Saxbe (II)*, 162 U.S.App.D.C. 284, 290-91, 489 F.2d 1017, 1023–24 (1974). Finally, investigative arrests are the type of "police excesses [which] bear the seed of untoward counter reactions of violence." *Lankford v. Gelston*, 364 F.2d 197, 204 n. 7 (4th Cir. 1966).

In some societies, arrests are used as "alternative means to deal with persons who cannot be successfully prosecuted

[26] Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue*, 47 Geo.L.J. 1, 22 (1958).

for their activities, though they are a menace to public security and order." Gledhill, *Fundamental Rights in India* 127 (1955).[27] In the Soviet Union, "arrests occur in the form of 'campaigns' which represent a concentrated effort by the regime to solve some pressing political or social problem." Bauer, *Arrest in the Soviet Union* 1 (1954). See also Lowry, *Internment: Detention without Trial in Northern Ireland*, 5 Human Rights 261 (1976). As Mr. Justice Jackson wrote shortly after his return from the Nuremberg trials:

> Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police. *Brinegar v. United States*, 338 U.S. 160, 180–81 (1949) (dissenting opinion)

In our system, crimes may not be solved by a call to "round up the usual suspects." This is so because "there is no legal basis for arresting persons simply as a means of detaining them while an investigation of their possible involvement in a crime is conducted."[28] Arresting a person on suspicion, like arresting a person for investigation, is foreign to our system, even when the arrest is for past criminality." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 169 (1972).

[27] As quoted in Bayley, *Preventive Detention in India* 75 (1962).

[28] President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Police* 186 (1967); See, e.g., *Henry v. United States*, 361 U.S. 98 (1959); *Terry v. Ohio*, 392 U.S. 1 (1968); *Davis v. Mississippi*, 394 U.S. 721 (1969); *United States v. Ortiz*, 422 U.S. 891 (1975).

Legitimizing investigative arrests reduces the Fourth Amendment to "little more than rhetoric,"[29] and undermines the integrity of the fact finding process at any subsequent criminal prosecution. Investigatory seizures are planned "in the hope that something will turn." *Brown v. Illinois*, 422 U.S. 590, 605 (1975). To insure that "something will turn up," prompt presentment statutes are ignored[30] so that the police may convince a suspect to "waive" his *Miranda* rights.[31] This is precisely the factual setting of *Brown v. Illinois*, 422 U.S. 590 (1975). The result is little different than that condemned more than forty years ago in the Wickersham Commission Report on coercive interrogation procedures. Chafee, Pollak and Stern, *The Third Degree* (Arno ed. 1969).

In addition to producing, as in this case, an oral confession of disputed authenticity, investigative arrests will often result, as here, in corporeal identification procedures held prior to

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[29] *Bivens v. Six Unidentified Agents*, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting) The decision below first eliminates any deterrent from exclusion of the fruits of investigative arrests. See *Brown v. Illinois*, 422 U.S. 590 (1975). Second, the decision below, by finding "probable cause" for investigative arrests, creates a "good faith" defense to any action for money damages. *Pierson v. Ray*, 386 U.S. 547 (1967).

[30] See Note, *Admissibility of Confessions Obtained Between Arrest and Arraignment: Federal and Pennsylvania Approaches*, 79 Dick.L.Rev. 309, 341-42 (1974); Hopkins, *Our Lawless Police* 65 (1931) ("And the winnowing process–the delayed appearance in court, the incommunicado, the third degree–is a further extension of an unlawful series implied or necessitated by the initial illegality.")

[31] See Kamisar, *Kauper's "Judicial Examination of the Accused" Forty Years Later–Some Comments on a Remarkable Article*, 73 Mich.L.Rev. 15, 28 (1974):

> Allowing the police to give legal advice to, and obtain "waivers" from suspects outside the presence of any judicial officer is troublesome enough. . . . The problem is aggravated when, even though feasible, no stenographic transcript (let alone an electronic recording) of the "waiver transaction" need be made; when–as most lower courts have held–the police officer's disputed and uncorroborated recollections of the "waiver" event suffice. . . .

the formal "initiation of adversary judicial criminal procedures." *Kirby v. Illinois*, 406 U.S. 683, 689 (1972). The result is that counsel is not available to be a witness to any unfairness in the identification procedure–an important role stressed by the Court in *United States v. Wade*, 388 U.S. 218, 231-37 (1967).[32]

The decision of the court of appeals in this case does not encourage the "development of rational alternatives" to the exclusionary rule. See *Stone v. Powell*, 428 U.S. 465, 500 (1976) (Burger, C.J., concurring). To the contrary, the decision below encourages "police use of unnecessarily frightening or offensive methods of surveillance and investigation," activities prohibited by the Fourth Amendment. *United States v. Ortiz*, 422 U.S. 891, 895 (1975). Accordingly, the decision below must be reversed, and the case remanded to the district court for reinstatement of its writ of habeas corpus.

C.

PRIOR RECOURSE TO A DISINTERESTED JUDICIAL OFFICER IS REQUIRED BEFORE POLICE OFFICERS MAY, ABSENT EXIGENT CIRCUMSTANCES, SEARCH A DWELLING TO SEIZE SUSPECTS.

A search warrant plainly would have been required if the police in this case had entered the Browder residence to seize physical evidence. "The search of a private dwelling without a warrant is, in itself, unreasonable and abhorrent to our

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[32] In petitioner's appeal from the denial of state collateral relief, the Illinois Appellate Court rejected our argument that *Kirby v. Illinois, supra*, requires counsel at a post-arrest lineup held when, as here, formal charges should have been, but were not, filed. (App. 108.) The same result has recently been reached by the Seventh Circuit, *United States ex rel. Burbank v. Warden*, 535 F.2d 361, 370 (7th Cir. 1976).

laws."[33] The police had ample opportunity to seek a warrant, and there were absolutely no circumstances requiring prompt action.[34] Had recourse been made to "a magistrate to pass on the desires of the police before they violate the privacy of the home," *McDonald v. United States*, 335 U.S. 451, 456 (1948), the blatantly investigative arrests and the night-time invasion of the Browder dwelling would not have occurred.

Even a court clerk,[35] presented with the facts set out in Conroy's report (App. 159), would have ruled that "information from a known informer" could not justify the night-time search of a dwelling to seize four suspects to determine which one should be charged for an offense committed two days before. Even if the police could have articulated facts to show that the offender sought was "a teen-aged Browder, like 15, 16, 17, 18" (App. 146), a disinterested judicial officer would not have authorized a night-time search of the Browder

[33] *Agnello v. United States*, 269 U.S. 20, 32 (1925); *United States v. Lefkowitz*, 285 U.S. 452 (1932); *Johnson v. United States*, 333 U.S. 10 (1948); *Mancusi v. DeForte*, 392 U.S. 364 (1968); *See v. City of Seattle*, 397 U.S. 541 (1967); *G.M. Leasing Corp. v. United States* —U.S.—, 97 S.Ct. 619 (1976).

[34] There was no need for prompt action because the search and seizure was based on information which the police claimed to have received on January 29, 1971 (App. 129-30), but which was not acted upon until two days later. (App. 135.) This delay conclusively shows the absence of exigent circumstances. *G.M. Leasing Corp. v. United States*, ––U.S.––, 00-00, 97 S.Ct. 619, 631-32 (1976).

Nor had the officers perceived any need for prompt action. Officer Conroy claimed to have telephoned the Browder residence in advance, and "knew the gentlemen would be waiting." (App. 63.) Thus, the police perceived "no probability of a material change in the situation during the time necessary to secure [a] warrant." *Taylor v. United States*, 286 U.S. 1, 6 (1932). Accordingly, there were no exigent circumstances to excuse the need for a warrant. See *Coolidge v. New Hampshire*, 403 U.S. 443, 460-64 (1971).

[35] Cf. *Shadwick v. City of Tampa*, 407 U.S. 345 (1972) (court clerk may issue warrants for ordinance violations)

residence to seize "all teen-aged males whose surname is Browder." Such a warrant would have contravened the requirement of the Fourth Amendment[36] that a warrant particularly describe the things to be seized so that "nothing is left to the discretion of the officer executing the warrant." *Marron v. United States*, 275 U.S. 192, 196 (1927). Just as "[t]he fact that packages have been stolen does not make every man who carries a package subject to arrest nor the package subject to seizure," *Henry v. United States*, 361 U.S. 98, 104 (1959), so too the fact that a teen-aged male whose surname is Browder may have committed an offense does not subject to arrest all teenagers whose surname is Browder: The police must have reasonable grounds to believe that a particular teen-aged Browder has committed that offense. See *ante* at 28-30.

In this case, any application for a warrant would have been refused, and the police advised to continue their investigation. See *United States v. Watson*, 423 U.S. 411, 455 n. 22 (1976) (Marshall, J., dissenting). In some jurisdictions, upon a showing that the offender sought was one of several persons, the police could have made recourse to a "narrowly circumscribed procedure" as suggested by the Court in *Davis v. Mississippi*, 394

[36] "The Fourth Amendment commands that a warrant issue not only upon probable cause . . . but also 'particularly describing the place to be searched, and the persons or things to be seized!" *Berger v. New York*, 388 U.S. 41, 55 (1967).

U.S. 721, 728 (1969).[37] But the unresolved question of whether such a procedure is consistent with the Fourth Amendment, *United States v. Dionisio*, 410 U.S. 1, 11 (1973), is not presented in this case; as in *Davis v. Mississippi, supra*, "it is clear that no attempt was made here to employ procedures which might comply with the requirements of the Fourth Amendment: the detention at police headquarters of petitioner and the other young Negroes was not authorized by a judicial officer . . ." *Id.* at 728.

This Court has repeatedly reserved the question of whether a warrant is required to search a dwelling when the seizure of a person–rather than "papers and effects"–is sought.[38]

[37] An investigative detention pursuant to such a "narrowly circumscribed procedure" is a significantly less intrusive invasion of privacy than a night-time dwelling search and arrest.

The model statute set out in Article 170 of the ALI, A Model Code of Pre-Arraignment Procedure (1975) allows a judicial official to issue a "nontestimonial identification order" upon a particularized showing of need. Sec. 170.2. This order is to be served on a week-day between 8:00 a.m. and 8:00 p.m. (Sec. 170.5(2)), and may be challenged prior to an appearance. (Sec. 170.3(k).) In addition, a change in the "time, place or method" of appearance may be requested. (Sec. 170.4.) Each of these rights, and a specific warning that the suspect need not respond to any interrogation (Sec. 170.3(k)) is included in the order to appear. (Sec. 170.3.)

Similar procedural safeguards are to be found in the statutes and court decisions adopting such "narrowly circumscribed procedures." See, e.g., Ariz. Rev. Stat. Ann. §13-1424 (1973 supp.); Idaho Code §19-625 (1976 supp.); N.C. Gen. Stat. §15A-271 et seq.; *Wise v. Murphy*, 275 A.2d 105 (D.C.App. 1971) (in banc); *In re Fingerprinting of M.B.*, 125 N.J.Super. 115, 309 A.2d 3 (1975); *United States v. Greene*, 139 U.S.App.D.C. 193, 429 F.2d 193 (1970). Cf. *State v. Bell*, 334 So.2d 385 (La. 1976) (accused free on bail, may only be ordered to appear for a lineup upon finding by court that appearance would be "just and reasonable.")

[38] See, e.g., *Jones v. United States*, 357 U.S. 493, 499-500 (1958); *Coolidge v. New Hampshire*, 403 U.S. 443, 480-81 (1971); *United States v. Watson*, 423 U.S. 411, 418 n. 6 (1976); *United States v. Santana*, 427 U.S. 38 (1976). Cf. *Warden v. Hayden*, 387 U.S. 294 (1967); *Johnson v. Louisiana*, 406 U.S. 356 (1972).

Each item, of course, is specifically enumerated in the Fourth Amendment, and it should be of no consequence that a dwelling search is made to seize persons, rather than to seize "papers and effects."[39] As the Court has noted in a different context, "the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972). This is especially true with respect to the Fourth Amendment, which "protects people–and not simply 'areas'–against unreasonable searches and seizures." *Katz v. United States*, 389 U.S. 347, 353 (1967).

In *Camara v. Municipal Court*, 387 U.S. 523 (1967) the Court held that "the purposes behind the warrant machinery contemplated by the Fourth Amendment," Id. at 532, prohibit warrantless dwelling entries to search for building code violations. *Id.* at 534. As in *Camara v. Municipal Court, supra*, allowing police to enter dwellings to search for and to seize persons in the absence of an emergency vests the police with "precisely the discretion to invade property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search." *Id.* at 532-33.

[39] In this case, the search of the Browder residence was an essential prerequisite to the seizure of the four "suspects." The physical description of the offender sought was too vague to allow an arrest on sight, as in *United States v. Watson*, 423 U.S. 411 (1976), and the police could not have maintained surveillance of the home until the suspect sought emerged. Compare *United States v. Santana*, 427 U.S. 38, 45 (1976) (Stevens, J., concurring).

In these circumstances, what was said in *Morrison v. United States*, 104 U.S. App.D.C. 352, 355, 262 F.2d 449, 452 (1958) is applicable here:

> The police entered the house to make a search. It was, to be sure, a search for a person rather than the usual search for an article of property, but it was a search. . . . The government urges that . . . we apply the rules governing arrest. But the search was a factual prerequisite to an arrest; it was the first objective of the entry; the officers did in fact search the house. They entered to make a search as a necessary prerequisite to possible arrest.

The lower federal courts which have considered this question have in general held that exigent circumstances on a warrant is required before police may enter a dwelling to arrest, following the reasoning of the unanimous in banc court of appeals for the District of Columbia in *Dorman v. United States*, 140 U.S.App.D.C. 313, 435 F.2d 385 (1970).[40] The state courts have reached similar results.[41]

At the present time, the only practical incentive for law enforcement officials to adhere to the standards of the Fourth Amendment is the deterrent sanction of the exclusionary rule. But merely excluding the fruits of an unlawful arrest from use at trial has an uncertain effect in deterring future police misconduct. *United States v. Janis*, 428 U.S. 433, 450 n. 22 (1976). This is especially true when, as here, the totality of state procedures postpone adjudication of the Fourth Amendment issue until the prisoner has exhausted state remedies and reaches the federal courts. See *Stone v. Powell*, 428 U.S. 465, 493-94 (1976), discussed *infra* at 40-50. Finally, exclusion of the fruits of an unlawful arrest provides no redress for persons who are arrested in a dragnet, but, as here, are released after "processing." In contrast to the limited reach of the exclusionary rule, the warrant clause of the Fourth Amendment, by its very operation, deters wrongful police conduct and protects Fourth Amendment rights generally.

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[40] See, e.g., *Vance v. North Carolina*, 432 F.2d 984 (4th Cir. 1970); *United States v. Shye*, 492 F.2d 1131 (6th Cir. 1974); *United States v. Phillips*, 497 F.2d 1131 (9th Cir. 1974).

[41] See, e.g., *People v. Ramey*, 16 Cal.3d 263, 127 Cal.Rep. 629, 545 P.2d 1333 (1976); *People v. Moreno*, 176 Colo. 488, 490 P.2d 575 (1971); *State v. Lasley*, ––Minn.––, 236 N.W.2d 604 (1975); *People v. Wolgemuth*, 43 Ill.App.3d 335, 356 N.E.2d 1139 (1976), appeal allowed, No. 49149, March Term, 1977, 66 Ill.2d; *State v. Girard*, 276 Or. 511, 555 P.2d 445 (1976); *Commonwealth v. Ford*, ––Mass.––, 329 N.E.2d 717 (1975); *State v. Johnson*, 232 N.W.2d 477 (Iowa, 1975). *Contra, State v. Perez*, 277 So.2d 778 (Fla. 1973).

In order to provide the greatest protection against recurrence of the egregious police misconduct apparent in this case,[42] the Court should hold that prior recourse to a disinterested judicial officer is required whenever there are no exigent circumstances and law enforcement officials wish to enter a dwelling to arrest. Such a holding would require that the decision of the court of appeals be reversed.

D.

HABEAS CORPUS RELIEF WOULD NOT BE PRECLUDED BY *STONE v. POWELL*, 428 U.S. 465 (1976).

For several reasons, *Stone v. Powell*, 428 U.S. 465 (1976) is no bar to habeas corpus relief in this case. First, the totality of state procedures failed to provide petitioner with "an opportunity for full and fair litigation of [his] Fourth Amendment claim." *Id.* at 494. Second, even if the state had provided petitioner with a "full and fair opportunity," but had nonetheless misconceived the Fourth Amendment and denied relief, a federal remedy would be required because of the flagrancy

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[42] Requiring warrants in the circumstances of this case will also improve the reliability of the fact-finding process: When an arrest is made under a warrant, adversary judicial proceedings have commenced, and a suspect is entitled to counsel at a post-arrest lineup. *United States ex rel. Robinson v. Zelker*, 468 F.2d 159 (2d Cir. 1972); *People v. Hinton*, 23 Ill.App.3d 369, 319 N.E.2d 313 (1974).

of the Fourth Amendment violation–not present in *Stone v. Powell*–which underlies this case.[43]

1.

The absence of "full and fair litigation" in the state courts.

The *sine qua non* of *Stone v. Powell*, 428 U.S. 465 (1976)–that "the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim," *Id.* at 494–is plainly lacking in this case. Because appointed trial counsel failed to raise the Fourth Amendment claim "in the trial court, either during the trial or in the motion or argument for a new trial" (App. 9), the state courts refused to adjudicate that issue,

[43] If, as we have argued (*ante* at 19-23), notice of appeal was not timely filed, the order granting the petition has become a "final judgment" for retroactivity purposes. *Linkletter v. Walker*, 381 U.S. 618, 622 n. 5 (1965). The question of whether *Stone v. Powell, supra*, is to be afforded full retroactive effect has yet to be considered by any of the courts of appeals, see *United States ex rel. Saiken v. Bensinger*, 546 F.2d 1292, 1295 (7th Cir. 1976), and absent a cross-petition for certiorari should not be considered for the first time in this case. We note, however, that retroactive application of *Stone v. Powell* would undo the grants of relief in *Whiteley v. Warden*, 401 U.S. 560 (1971), *Lefkowitz v. Newsome*, 420 U.S. 283 (1975), along with countless other cases. Such retroactive application would be contrary to *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872).

either on direct appeal or in state collateral proceedings.[44] The result, as recognized by the Director in the district court (App. 119, ¶5), is that the "issue of probable cause was never litigated" in state court proceedings.

The state courts did not rely on any tactical basis for the failure of trial counsel to have raised the Fourth Amendment issue, but merely followed the state practice of refusing to allow an inquiry into the "judgment and discretion" of trial counsel.

[44] On direct appeal, the Illinois Appellate Court rejected petitioner's attempt to raise the Fourth Amendment issue as plain error. (App. 9-11.) Petitioner challenged this application of the state waiver rule in his petition for review to the Illinois Supreme Court (App. 16), arguing that when "defense counsel inadvertently failed to pinpoint the unlawful arrest as the basis of the motions to suppress the fruits of the arrest," the waiver rule applied by the appellate court improperly "denied defendant a fair opportunity to raise and have adjudicated on direct appeal his Fourth Amendment claims, when the factual basis for these claims is clear from the trial court record." (Ibid.) Review was denied without opinion. 54 Ill.2d 597 (1973).

Petitioner also sought to adjudicate the Fourth Amendment issue in the state courts through the Illinois Post-Conviction Hearing Act, Ill.Rev.Stat. ch. 38, §122-1 et seq. The trial court dismissed the petition without the reception of evidence. The Illinois Appellate Court affirmed, holding that there could not be "any further consideration" of the unlawful arrest issue because it had been raised, albeit not adjudicated, on direct appeal (App. 108):

> Petitioner having argued in his direct appeal that his arrest was illegal and that all things flowing therefrom should have been suppressed is now barred from any further consideration of that issue in post-conviction proceedings by the doctrine of res judicata.

This "doctrine of res judicata" renders the Illinois post-conviction procedure ineffective to protect a prisoner's rights. See *United States ex rel. Williams v. Brantley*, 502 F.2d 1383 (7th Cir. 1975).

People v. Newell, 48 Ill.2d 392, 397, 268 N.E.2d 17, 19 (1971).[45] In these circumstances, *Henry v. Mississippi*, 379 U.S. 443 (1965) requires that

> [P]etitioner could have a federal court apply settled principles to test the effectiveness of the procedural default to foreclose consideration of his constitutional claim. If it finds the procedural default ineffective, the federal court will itself decide the merits of his federal claim, at least as long as the state court does not wish to do so. *Id.* at 452.

This is precisely what happened in this case. On consideration of petitioner's application for a writ of habeas corpus, the district court found that "no reasonable tactical basis is apparent to justify the failure to object [to the illegality of the arrest]." (App. 113.) Then, after finding that the procedural default was ineffective to foreclose consideration of the Fourth Amendment claim, the district court turned to the merits of that issue. (Ibid.)[46]

The district court's finding that there was "no reasonable tactical basis" for the failure of trial counsel to have raised the Fourth Amendment claim at trial has never been challenged by the Director, and therefore need not be reconsidered here.

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[45] This rule is illustrated in the disposition of petitioner's claim, advanced in the state post-conviction proceeding, that trial counsel was incompetent in failing to call alibi witnesses, a defect in the defense case which was vigorously argued to the jury by the prosecution. (App. 99-100). The trial court refused to hold a hearing on petitioner's averment that he had told trial counsel about these witnesses prior to trial. (App. 107.) The Illinois Appellate Court affirmed, holding "that the failure to call the alibi witnesses was a matter of trial tactics and does not demonstrate incompetency of counsel." (Ibid.)

[46] Cf. *Tollett v. Henderson*, 411 U.S. 258, 268 (1973) (After plea of guilty, federal habeas corpus relief on claim of unconstitutional discrimination in selection of grand jurors requires proof of such discrimination and a showing "that his attorney's advice to plead guilty without having made inquiry into the composition of the grand jury rendered that advice outside the 'range of competence demanded of attorneys in criminal cases.' ")

Strunk v. United States, 412 U.S. 434, 437 (1973). But a belated claim of error in this regard would be without merit.

Prior to trial, defense counsel sought to suppress the oral confession and to bar the use of identification testimony. (App. 17-18, 19.) While these motions did not raise the illegality of petitioner's arrest as a basis for suppression, the facts pertaining to the arrest should have been known to counsel from conversations prior to trial with his client,[47] and from a pre-trial investigation.[48] Even without any trial preparation whatsoever, evidence adduced at the hearing on the pre-trial motions demonstrated the non-frivolity of a claim that petitioner had been unlawfully arrested and that the confession and testimony about the lineup identification were the tainted fruits of that arrest.[49]

Trial strategy adopted by defense counsel was to convince the jury that the identification testimony was unreliable, and to urge the jury to reject as not credible police testimony about the existence of an oral confession. (App. 51.) For reasons that are at best obscure, trial counsel repeatedly returned to the circumstances of the arrest during his cross-examination of prosecution witnesses at trial. (App. 58-59, 63, 67, 72-73, 81-82.) But this evidence was used neither as the basis of a renewed motion to suppress, nor as a means of evoking sympathy from the jury: After the prosecution had

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[47] The motion to suppress the oral confession reveals that counsel at least knew where and when petitioner had been arrested. (App. 17, ¶1.)

[48] See A.B.A. Standards Relating to the Administration of Criminal Justice, *The Defense Function* §3.6(a) (1972).

[49] Testimony at the hearing on the pre-trial motions revealed that petitioner had been arrested on the basis of information about "a possible offender by the name of Browder" (App. 21), that this information resulted in the arrest of all the teen-age males found at the Browder residence, including two persons whose surname was not Browder (App. 29), that the arrestees had all been charged with "investigation of rape," (App. 30), and that the arrests had been made so that the police "could clear up the investigation." (App. 36)

made its closing argument, defense counsel waived final argument. (App. 101.)[50]

In this case, it might well be that the performance of trial counsel could provide a basis for habeas corpus relief under the Sixth Amendment. See *Cooper v. Fitzharris*, 551 F.2d 1162 (9th Cir. 1977).[51] But the Court need not decide in this case whether the failure of trial counsel to have raised the Fourth Amendment issue would justify relief irrespective of the merits of that claim—even if petitioner did receive the effective assistance of counsel required by the Sixth Amendment, the non-tactical failure of trial counsel to have raised the obvious Fourth Amendment claim, coupled with the refusal of the state courts to excuse that default, deprived petitioner of the "opportunity for full and fair litigation of a Fourth Amendment claim," required by *Stone v. Powell*, 428 U.S. at 494.

Stone v. Powell should not be extended to allow a state to first furnish an indigent accused with trial counsel who fails to recognize an obvious Fourth Amendment claim and then to deny the accused an opportunity to adjudicate that claim because, through negligence or inadvertence, counsel failed to raise the issue at trial. Such would be the situation in this case

[50] Cf. *Herring v. New York*, 422 U.S. 853, 858 (1975) ("Closing argument for the defense is a basic element of the adversary fact-finding process in a criminal trial.")

[51] "If the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel." *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

Counsel, of course, has a duty to remain abreast of developments in the law, Ethical Consideration 6-2, *A.B.A. Code of Professional Responsibility* (1970), and we note that in two other Illinois cases from the same time period which have reached this Court, trial counsel did in fact seek to suppress intangible evidence as the tainted fruit of an unlawful arrest. See *Brown v. Illinois*, 422 U.S. 590 (1975); *Kirby v. Illinois*, 406 U.S. 682 (1972). Cf. *People v. Bean*, 121 Ill.App.2d 332, 257 N.E.2d 562 (1971) (reversing conviction of Kirby's co-defendant on the basis of *Wong Sun v. United States*, 371 U.S. 471 (1972))

if the Court is to hold that habeas corpus relief may be withheld from petitioner. As the lower federal courts have held,[52] *Stone v. Powell* should not be extended to reach such a result.

2.

Stone v. Powell should not be extended to a case involving flagrant police misconduct which results in evidence of inherent untrustworthiness.

Even if petitioner has received a "full and fair opportunity" to litigate his Fourth Amendment claim in the state courts, *Stone v. Powell*, 428 U.S. 465 (1976) should not be extended to preclude a federal remedy for flagrant violations of the Fourth Amendment which result in evidence of inherent untrustworthiness.

The cases consolidated in *Stone v. Powell* arose from attempts by two prisoners to collaterally attack their state court convictions, based on "typically reliable" physical evidence, 428 U.S. at 490, which had been seized as the result of good faith violations of the Fourth Amendment. Respondent Powell had been arrested for violation of a vagrancy ordinance which was later held to be unconstitutional. *Id.* at 470-71. In the search incident to Powell's arrest, the police discovered a handgun. *Id.* at 469. This weapon was used to show that Powell had committed a murder. *Id.* at 470. Respondent Rice complained of the admission into evidence against him of "dynamite, blasting caps, and other materials useful in the construction of explosive devices," *Id.* at 472, which had been

[52] See, e.g., *Gates v. Henderson*, —F.2d— (No. 76-2065, 2d Cir., January 12, 1977); *O'Berry v. Wainwright*, 546 F.2d 1204, 1213 (5th Cir. 1977); *Sosa v. United States* 550 F.2d 244, 249 (5th Cir. 1977); *United States ex rel. Wilson v. Warden*, —F.Supp.— (No. 75 C 3776, N.D. Ill., March 22, 1977).

found in plain view when police officers were executing a search warrant. *Id.* at 472. This warrant was subsequently held to have been issued without probable cause. *Id.* at 473–74.

In these situations, the Court held that application of the exclusionary rule would have only a minimal impact towards deterring police lawlessness, and would not further the "imperative of judicial integrity," because the police had acted in a good faith belief that their conduct was lawful. *Id.* at 485 n. 23.

In contrast to the fact situations before the Court in *Stone v. Powell*, this case arises from a warrantless night-time invasion of a dwelling–the "evil in its most obnoxious form"[53] addressed by the Fourth Amendment. There was no emergency justifying the invasion of the home, nor was there probable cause to seize any particular person found within that house. The purpose of the warrantless search and seizure is clear–to see which, if any, of the persons seized would be identified at a lineup. As we have previously demonstrated, this search and seizure is reminiscent of the indiscriminate and discretionary seizures that would be made under the general warrants emphatically proscribed by the Fourth Amendment. See *ante* at 27-41.

Nor did the search and seizure in this case result in "the most probative information bearing on the guilt or innocence of the defendant." 428 U.S. at 490. Unlike the "typically reliable" physical evidence in *Stone v. Powell, Ibid.*, the search and seizure in this case resulted in an oral confesssion of disputed existence, and an eyewitness identification made at an unnecessarily suggestive lineup.[54]

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[53] *Monroe v. Pape*, 365 U.S. 167, 210 (1961) (Frankfurter, J., dissenting).

[54] Petitioner denied that he had made an oral confession. (App. 84.) The police admitted that no attempt had been made to obtain a written confession. (App. 82.)

Petitioner was the only person in the lineup wearing a white hat. (App. 20-21, 73.) In addition, he was the only person with a bandage or cast on his right hand. (App. 20, 25.) Testimony was in conflict as to whether the lineup had been viewed by eyewitnesses simultaneously (App. 19) or separately. (App. 23, 26.)

The plainly unlawful search and seizure in this case requires "significantly different judicial responses" than in *Stone v. Powell.* See *Brown v. Illinois*, 422 U.S. 590,610 (1975) (Powell, J., concurring). The police conduct in this case is such that "the deterrent value of the exclusionary rule is most likely to be effective, and the corresponding mandate to preserve judicial integrity . . . most clearly demands that the fruits of official misconduct be denied." *Id.* at 611. If, under the facts of this case, the state courts so misconstrue the Fourth Amendment as to deny relief, warrantless investigatory arrests would be encouraged by police knowledge that the state courts will not bar the use at trial of anything that "turns up" in those arrests. *Brown v. Illinois*, 422 U.S. at 602, 605. This Court's certiorari jurisdiction does not provide an effective mechanism to correct the state courts' errors. Review in this Court "depends on numerous factors other than the perceived correctness of the judgment we are asked to review," *Ross v. Moffitt*, 417 U.S. 600, 617 (1974), and a state need not assist an indigent prisoner in seeking review in this Court. *Id.* at 618. Under the circumstances of this case, even if the "search and seizure claim was erroneously rejected by two or more tiers of state courts," *Stone v. Powell*, 428 U.S. at 491, "further review of the Fourth Amendment claim will likely contribute to the deterrent purpose of the exclusionary rule more than it will increase the societal costs which always attend the rule." *Pope v. Parratt*, ––F.Supp.––, –– (No. CF75-L-105, D.Neb., April 18, 1977).

Enforcement of the Fourth Amendment's proscription of general warrants is too important to be delegated to the exclusive province of the state courts, subject only to the possibility that a *pro se* prisoner will be successful in invoking this Court's discretionary jurisdiction. The core of the Fourth Amendment is of sufficient importance so that what Mr. Justice Frankfurter wrote in *Brown v. Allen*, 344 U.S. 456 (1953) is applicable here:

> The State court cannot have the last say when it, though on fair consideration and what procedurally may be

deemed fairness, may have misconceived a constitutional right. *Id.* at 508.

For these reasons, even if petitioner has received the "full and fair" opportunity required by *Stone v. Powell*–which petitioner clearly did not receive–federal habeas corpus relief should not be withheld as a remedy for the flagrant police misconduct apparent in this case.

IV.

A FEDERAL COURT OF APPEALS LACKS THE POWER TO WITHHOLD ANY OF ITS OPINIONS FROM PUBLICATION AND TO *A PRIORI* DEPRIVE SUCH UNPUBLISHED OPINIONS OF PRECEDENTIAL VALUE.

This is the first case to reach the Court where the propriety of a circuit rule authorizing dispositions in unpublished orders which may not be cited as precedent in subsequent cases is squarely at issue.[55] In this case, after the court of appeals had announced its decision in an "unpublished order," petitioner requested that the opinion be released for publication. (App. 170–71.) This motion was denied without explanation. (App. 172.)

Prior to this case, recurring problems in "not for publication rules"–which have been adopted by all of the courts of

[55] A comprehensive amicus brief, which does not duplicate our arguments, has been filed on this issue by the Chicago Council of Lawyers.

appeals[56]–have evaded review.[57] At least one of these problems, i.e., whether "unpublished opinions" are truly non-precedential, has injured petitioner in this case. As we pointed out in our petition for re-hearing in the court of appeals, is it at least arguable that the panel discussion is contrary to prior decisions of the Seventh Circuit. (Pet. for Re-hearing, No. 76-1089, 7th Cir., 2-3, 9-11.) Given the "non-precedential" status of unpublished opinions, there was little incentive for the in banc court to convene, and in fact the court denied re-hearing without ordering a response.

It is also conceivable that among the unpublished opinions of the court of appeals there is additional precedent contrary to the panel opinion in this case. But there is no index of unpublished opinions available to the public,[58] and even if we

[56] First Circuit, Appendix B to Circuit Rules; Second Circuit Rule .23; Third Circuit, Int. Op. Proc., Rule D; Fourth Circuit Rule 18; Fifth Circuit Rule 21; Sixth Circuit Rule 11; Seventh Circuit Rule 35; Eighth Circuit Rule 14; Ninth Circuit Rule 21; Tenth Circuit Rule 17; D.C. Circuit Rule 13.

[57] See *Taylor v. McKeithen*, 407 U.S. 191 (1972) (reversal without opinion remanded with "virtually [an] express directive to the Court of Appeals that it write an opinion," *Id.* at 195 (Rehnquist, J., dissenting)); *Rose v. Hodges*, 423 U.S. 19 (1975) (intra-circuit conflict between decisions reached in published and unpublished decisions, the Court refusing to "respect that prohibition" of citation of unpublished decisions. *Id.* at 23 n. 2 (Brennan, J., dissenting))

[58] There may well be "some kind of intracourt index of unpublished opinions, indexed according to the subject matter and so forth." Testimony of Honorable Robert Sprecher, Judge, Seventh Circuit, in *Commission on Revision of the Federal Court Appellate System, Hearings–Second Phase 1974-1975*, Vol. I, 1974, at 536. If such an index exists, it is not available to the public.

could have found a favorable unpublished opinion, citation would have been prohibited by the local rule.[59]

The unpublished opinion rules are based upon guidelines developed by an *ad hoc* "group of distinguished lawyers, law teachers, and judges" brought together in 1972 by the Federal Judicial Center "for the purpose of commencing a study in depth of the appellate systems of the United States, both state and federal."[60] The committee determined that the efficiency of intermediate appellate courts would be increased if opinion writing was simplified, and recommended that the highest court in each judicial system promulgate a uniform rule for the disposition of appeals by intermediate reviewing courts in unpublished, and non-citable opinions. See *Standards for Publication of Judicial Opinions*, Federal Judicial Research Center Series No. 72-3 (1973).

This Court has declined to promulgate a uniform rule.[61] The result is that "undesirable variations [have been introduced] within the system." *Standards for Publication of Judicial Opinions*, supra, 9. In the Fourth and Tenth Circuits unpublished opinions may be cited as precedent.[62] Rule 21

[59] Circuit Rule 35(b) (2) (iv) prohibits citation of unpublished orders "[e]xcept to support a claim of res judicata, collateral estoppel or law of the case . . . (a) in any federal court within the circuit in any written document or in oral argument; or (b) by any such court for any purpose." See *United States v. Erving*, 388 F.Supp. 1011, 1017 (D.Wis. 1975) (refusing to consider decision in unpublished order, even when "[n]o other relevant decision of the United States Court of Appeals for the Seventh Circuit has been cited by counsel, nor am I aware of any.")

[60] Preface to *Standards for Publication of Judicial Opinions, Opinions*, Federal Judicial Research Center Series No. 72-3 (1973). "Those who attended the first conference named themselves the Advisory Council on Appellate Justice and selected as Chairman Maurice Rosenberg, Nash Professor of Law at Columbia University." *Ibid.*

[61] The rules promulgated by each circuit are in response to a recommendation of the Judicial Conference. See Report of the Proceedings of the Judicial Conference of the United States, October 26-27, 1972, p. 33.

[62] Fourth Circuit Rule 18(d) (iii); Tenth Circuit Rule 17(c).

of the Fifth Circuit provides that unpublished opinions are non-precedential, but a panel of that court has recently held that a decision in an unpublished opinion "precludes the matter as far as this panel is concerned, and that any meaningful consideration of the argument could be given only by the Court sitting en banc." *United States v. Ellis*, 547 F.2d 863, 869 (5th Cir. 1977) (Roney, J., concurring). In the remaining circuits, decisions by unpublished order may not be cited, and are "non-precedential." Thus, when, as in this case, a panel reaches a result which is arguably in conflict with prior decisions, there is little, if any, incentive for the in banc court to convene to correct such a "non-precedential" departure from prior decisions.

Allowing the citation of "unpublished opinions"—the approach of the Fourth and Tenth Circuits—has recently been adopted in the A.B.A. *Standards Relating to Appellate Courts* (1977), §3.37(c). One danger in this approach is that unpublished opinions will become "like unexploded land mines, ready to do damage." Karlen, *Appellate Courts in the United States and England*, 100 (1963).

The alternative approach—that of prohibiting citation—is contrary to *Hicks v. Miranda*, 423 U.S. 332 (1975): Assuming that a court has jurisdiction over a case, any adjudication is an adjudication on the merits, and is entitled to precedential effect. *Id.* at 344. While it has been vigorously suggested that *Hicks* be reconsidered,[63] the Court has declined to do so. The result is that only when the Court's jurisdiction is discretionary, as in acting upon petitions for review by certiorari, does a disposition have no precedential value. Unlike the discretionary certiorari jurisdiction of this Court, the courts of appeals lack the power to decide which cases to decide on the merits. *Garrisson v. Patterson*, 391 U.S. 464 (1968). The presumed existence of such a power is at the heart of the "no-citation" rules, which must fall in light of *Hicks v. Miranda, supra.*

[63] See, e.g., *Colorado Springs Amusements, Ltd. v. Rizzo*, 428 U.S. 913 (Brennan, J., dissenting from denial of certiorari).

Nor should the power to determine which of its opinions are to be published rest in the court issuing that opinion. First, this is akin to a copyright on judicial opinions, rejected in *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834), and in *Banks v. Manchester*, 128 U.S. 244 (1888). Second, there is the possibility that unpublished opinions will be used "to avoid making a difficult or troublesome decision or to conceal divisive or disturbing issues." *N.L.R.B. v. Amalgamated Clothing Workers*, 430 F.2d 966, 972 (5th Cir. 1970) (Brown, C.J., cautioning against such use).[64] In addition, as Mr. Justice Stevens has observed:

> Such a rule assumes that an author is a reliable judge of the quality and importance of his own work product. If I need authority to demonstrate the invalidity of that assumption, I refer you to a citizen of Illinois who gave a brief talk in Gettysburg, Pennsylvania that he did not expect to be long remembered. Judges are the last persons who should be authorized to determine which of their decisions should be long remembered. (Address to Illinois State Bar Association's Centennial Dinner, January 22, 1977, p. 9.)

[64] See also the comments of the editors of the Selective Service Law Reporter commenting about the refusal of the district judge in *Shear v. Richardson*, 364 F.Supp. 43, 44 n. 1 (S.D.Ill. 1973) to permit the citation of *United States ex rel. Noga v. Laird*, an unpublished opinion noted in the table at 474 F.2d 1351 and reported in 6 S.S.L.R. 3277:

> . . . *Shear* presents serious questions about the wisdom of non-publication rules and their non-citation corrollaries. It would seem that such provisions strike at the very core of a common law judicial system, which necessarily depends in large measure on the development of law through case-by-case adjudication. Rules which place limits on the growth of case law should be subjected to careful scrutiny and viewed with disfavor. Furthermore, in using such devices, which in effect restrict the applicability of court decisions to the individual parties involved, courts abandon their public function and are reduced to making private rules.
>
> Invocation of these rules may also, as here, permit a judge to disregard another judge's or even his own Court of Appeals' decision without distinguishing or in any other way dealing with it except to point to its non-publication. This violation of the principle of *stare decisis* seems undesirable especially as the basis for such rules is generally judicial convenience and the need to conserve judicial resources.
>
> Finally, it might be argued that judicial decisions subject neither to public scrutiny nor to judicial evaluation may be less soundly based than those which are, as well as inconsistent with democratic principles. (6 S.S.L.R. 56-57, November 1973.)

Professor Rosenberg, who chaired the committee that proposed the *Standards for Publication of Judicial Opinions* which are the basis for the various circuit rules, has recently joined with two other scholars in writing against such a policy. Carrington, Meador & Rosenberg, *Justice on Appeal* (1976). In addition to noting the problems caused by a no-citation rule, *Id.* at 36–39,

> . . . a second reason for our rejection of it is even more central to the theme of this book. It is that non-publication inevitably reduces the visibility of the correcting function of the appeal. Over time, it must depreciate the basic function, leaving trial courts and administrative agencies more on their own, and increasing general anxiety about the integrity of the legal process at all levels. Visibility is too important to too many of our imperatives to be abandoned in favor of the limited benefits of non-publication. *Id.* at 39.

To "lighten the burden of library overgrowth," (*Id.* at 39), these scholars propose two series of law reports—one for comprehensive opinions, the other for short memorandum decisions *Id.* at 40. "[S]omeone other than the authors of the memoranda, perhaps an Official Reporter of stature (in the tradition of Edward Coke) should have the power to publish in permanent form memorandum decisions which have been improvidently classified by the court." *Id.* at 41.[65]

[65] A similar suggestion was made by Dean Pound more than thirty years ago: "A qualified and responsible reporter, having no interest except to make the reports useful to the public and the profession, could select occasional memoranda worth publishing. . . . [I]f the courts and the bar were given control of reporting, as the bar has long had control in England, a troublsome problem of the law and of the profession in America, the multiplication of reports, would be solved." Pound, *Appellate Review in Civil Cases*, 391 (1941).

In addition to these shortcomings, the unpublished opinion rules exceed the rule making powers which a court of appeals may exercise pursuant to 28 U.S.C. §2071. In contrast to the "rules for the conduct of [that court's] business" authorized by 28 U.S.C. §2071, the unpublished opinion rules have an impact upon the district courts, other courts of appeals, and upon the public in general.

In 1966, Congress amended 28 U.S.C. §2072 to vest this Court with the power to promulgate uniform rules of practice and procedure for the courts of appeals. Pub. L. 89-773, 80 Stat. 1323 (November 6, 1966). If the solution to the problem of "library overgrowth" is to be adoption of a rule allowing a court of appeals to decide which of its opinions may be published and have precedential value, then such a rule can only be promulgated by this Court, subject to the approval by Congress required by 28 U.S.C. §2072.

Unless and until such a uniform rule is promulgated and approved, the courts of appeals lack the power to designate any of their opinions as "not for publication," and as "non-precedential." Accordingly, the court below should be directed to release its decision in this case–and, by implication, its decisions in all other cases decided by "unpublished orders"–for publication free of any restrictions on citation.

CONCLUSION

For the reasons above stated, it is respectfully submitted that the decision of the court of appeals be reversed, and the case remanded to the district court with instructions to reinstate its writ of habeas corpus. In the alternative, the case should be remanded to the district court for resolution of the disputed questions of fact resolved in the first instance by the court of appeals.

In addition, the court of appeals should be directed to release its decision in this case for publication free of any restrictions on citation.

Respectfully submitted,

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APPENDIX

Circuit Rule 35 of the United States Court of Appeals for the Seventh Circuit

Circuit Rule 35. The following rule is the Plan for Publication of Opinions of the Seventh Circuit promulgated pursuant to resolution of the Judicial Conference of the United States:

(a) Policy. It is the policy of this circuit to reduce the proliferation of published opinions.

(b) Publication. The court may dispose of an appeal by an order or by an opinion, which may be signed or per curiam. Orders shall not be published and opinions shall be published.

(1) "Published" or "publication" means:

(i) Printing the opinion as a slip opinion;

(ii) Distributing the printed slip opinion to all federal judges within the cirucit, legal publishing companies, libraries and other regular subscribers, interested United States attorneys, departments and agencies, and the news media;

(iii) Permitting publication by legal publishing companies as they see fit; and

(iv) Unlimited citation as precedent.

(2) Unpublished orders:

(i) Shall be typewritten and reproduced by copying machine;

(ii) Shall be distributed only to the circuit judges, counsel for the parties in the case, the lower court judge or agency in the case, and the news media, and shall be available to the public on the same basis as any other pleading in the case;

(iii) Shall be available for listing periodically in the Federal Reporter showing only title, docket number, date, district or agency appealed from with citation of prior opinion (if reported) and the judgment or operative words of the order, such as "affirmed," "enforced," "reversed," "reversed and remanded," and so forth;

(iv) Except to support a claim of *res judicata*, collateral estoppel or law of the case, shall not be cited or used as precedent (a) in any federal court within the circuit in any written document or in oral argument or (b) by any such court for any purpose.

(c) Guidelines for Method of Disposition.

(1) Published opinions:

Shall be filed in signed or per curiam form in appeals which

(i) Establish a new or change an existing rule of law;

(ii) Involve an issue of continuing public interest;

(iii) Criticize or question existing law;

(iv) Constitute a significant and non-duplicative contribution to legal literature

(A) by a historical review of law;

(B) by describing legislative history; or

(C) by resolving or creating a conflict in the law; or

(v) Reverse a judgment or deny enforcement of an order when the lower court or agency has published an opinion supporting the order.

(2) Unpublished orders:

(i) May be filed after an oral statement of reasons has been given from the bench and may include only, or a little more than, the judgment rendered in appeals which

(A) are frivolous or

(B) present no question sufficiently substantial to require explanation of the reasons for the action taken, such as where

(aa) a controlling statute or decision determines the appeal;

(bb) issues are factual only and judgment appealed from is supported by evidence;

(cc) order appealed from is nonappealable or this court lacks jurisdiction or appellant lacks standing to sue; or

(ii) May contain reasons for the judgment but ordinarily not a complete nor necessarily any statement of the facts, in appeals which

(A) are not frivolous but

(B) present arguments concerning the application of recognized rules of law, which are sufficiently substantial to warrant explanation but are not of general interest or importance.

(d) Disposition is to be by Order or Opinion.

(1) The determination to dispose of an appeal by unpublished opinion shall be made by a majority of the panel rendering the decision.

(2) The requirement of a majority represents the policy of this circuit. Notwithstanding the right of a single federal judge to make an opinion available for publication, it is expected that a single judge will ordinarily respect and abide by the opinion of the majority in determining whether to publish.

(3) Any person may request by motion that a decision by unpublished order be issued as a published opinion. The request should state the reasons why the publication would be consistent with the guidelines for disposition of appeals as set forth in this rule.